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JUN 02 2009

OFFICE OF PETITIONS

In re Application of :
Peters et al. :
Application No. 10/822,910 :
Filed: 04/13/2004 :
Attorney Docket No. MSFT-3490/307339.01 :

DECISION ON PETITION

This is a decision on the petition under 37 CFR 1.181 (no fee), filed January 5, 2009, requesting withdrawal of the holding of abandonment in the above-identified application.

The petition is **GRANTED**.

This application was held abandoned for failure to reply to the Notice of Allowance mailed July 14, 2008, which set a three (3) month statutory period for reply. In the absence of a timely filed reply, the application became abandoned on October 15, 2008. On November 6, 2008, the Office mailed a Notice of Abandonment.

Petitioner asserts that the Notice of Allowance mailed July 14, 2008, was not received.

A review of the written record indicates no irregularity in the mailing of the Notice of Allowance and in the absence of any irregularity, there is a strong presumption that the Notice was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Notice was not in fact received.

As stated in Section 711.03(c)(I)(A) of the Manual for Patent Examining Procedure:

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an

Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

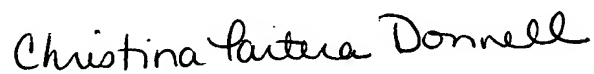
The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).

After reviewing the documents submitted on petition, the Office concludes that the showing of record is sufficient to warrant withdrawal of the holding of abandonment. The practitioner submitted a copy of the file jacket and docket records where the Notice of Allowance would have been entered had it been received and docketed. Additionally, the practitioner attested to the fact that a search of the records indicated that the Notice of Allowance was not received.

In view of the above, the holding of abandonment is withdrawn and the application is restored to pending status. No petition fee is required.

Technology Center Art Unit 2178 has been advised of this decision. The matter is being referred to the Technology Center's technical support staff for re-mailing of the Notice of Allowance. The three (3) month statutory period for responding to the Notice of Allowance will be set to run from the re-mailing date of the Notice.

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3211.

A handwritten signature in black ink that reads "Christina Tartera Donnell". The signature is written in a cursive, flowing style.

Christina Tartera Donnell
Senior Petitions Attorney
Office of Petitions